IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 422.

CAVU CLOTHES, INC., MONTIE M. BROHARD, JR., AND THE MACK SHIRT CORPORATION,
Petitioners,

vs.

SQUIRES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL STATEMENT OF MATTER INVOLVED.

Petitioners' statement of the matters involved in this case does not state the facts as they were presented to the Court of Appeals, and is merely an argumentative statement of the so-called "commercial success" of the petitioners' sport shirt products, upon which petitioners relied not only in the Patent Office to obtain issuance of the patents in suit, but also to sustain validity of the patents in this action.

Although the Court of Appeals' holding that the design patent in suit is invalid is attacked by petitioners, there is scarcely a mention of the large number of prior art

patents and publications which were so close to the disclosure of the design patent in suit as to leave no possible room for patentable invention under the Constitution and Statutes of the United States relating to patents.

It is significant that the supplemental record containing copies of the prior art patents and publications was not filed in the Supreme Court with the petition for certiorari, and only a single certified copy thereof was subsequently filed in the Supreme Court after insistence by respondent that the record before the Court was incomplete. Copies of this supplemental record have not been reproduced by petitioners in sufficient numbers to permit the members of the Court to inspect the prior art which is a part of the record in this case, and to which the opinion of the Court of Appeals specifically refers.

Petitioners' statement of the matter involved is so inadequate that we deem it necessary to supplement the statement so that this Court may have some idea of the subject matter which was before the Court of Appeals, and upon which its decision of invalidity was based.

THE PRINCIPAL QUESTION BEFORE THE LOWER COURTS WAS WHETHER THE PATENTS IN SUIT WERE VALID IN VIEW OF THE PRIOR ART. THERE WAS NO FACTUAL CONTROVERSY AS TO THE PRIOR ART.

This is an ordinary patent case involving the usual issues of validity and infringement, in which the record shows that two patents were issued to the same applicant, Montie M. Brohard, Jr., for a sport shirt having a zippered closure running diagonally from the neckband to the hip of the wearer. The District Court found one of the patents, No. 2,428,198 (R. 367) to be invalid, and found the other patent, Design No. 146,895 (R. 365) to be valid and infringed. Both patents illustrate the same shirt, and both patents were rejected by the Patent Office as involv-

ing no invention, but were finally issued after a showing in each application of a so-called "commercial success" of the sport shirt illustrated, the same identical instances of sales and acceptance being used by the applicant to obtain allowance of both of the patents in suit.

The District Court wrote no opinion.

The Court of Appeals held both patents to be invalid, citing in its opinion (R. 410-417) the prior art patents and publications which were before it.

These prior art patents and publications, with the exception of portions of the Angelica company catalog Exhibit V-1 (R. 399-401), were not included in the printed appeal record, but were, by stipulation (R. 407) presented to the Court of Appeals in folders containing only the prior art exhibits and portions of the Patent Office file histories. These exhibits are not included in the printed record presented with the present petition for certiorari. Some idea of the prior art may, however, be obtained from the opinion by the Court of Appeals (R. 414) wherein that Court said:

> "The features chiefly relied upon by the plaintiffs are the diagonal zipper closure, the concealment of its upper terminus under the righthand flap of the turnover collar, and the unbroken bosom front. All of these are disclosed by the prior art."

Most of the prior art patents and publications in evidence were never considered by the Patent Office. One example is the catalog of the Angelica Jacket Company (R. 399-401). This catalog, admittedly authentic and prior in date to the alleged Brohard invention, fully supports the Court of Appeals' statement in its opinion (R. 415), that

> "the Angelica Jacket Company of Chicago, as early as 1941, manufactured and sold professional coats and smocks with diagonal zipper closures offset from the

> center of the collar. One of these, styled 'Angelica White Twill', discloses the zipper closure starting on the right side of the collar extending diagonally to the right side of the wearer and then downward to a point at about the hips, with the resulting unbroken front rather similar to the zipper closure now under consideration."

This statement by the Court of Appeals is not in conflict in any way with any finding entered by the District Court.

In view of the prior art and the law applicable to design invention, the Court of Appeals stated:

> "Applying such test" (of patentable design invention) "to the design offered in the present case, we are of the opinion that it fails to meet the requirements." (R. 414.)
>
> "In our opinion the Brohard design patent does not show, in the light of the prior art, any exceptional talent beyond the range of the ordinary designer familiar with the prior art, and lacks the inventive quality required for a patentable design." (R. 416.)

Plaintiffs seek to imply by their "Summary Statement of Matter Involved", by their "The Question Presented" and by their "Reasons Relied on for Allowance of the Writ", that the Court of Appeals decided a question of fact contrary to a finding which the District Court made upon the basis of conflicting oral testimony. That is not the case.

The plaintiffs called as witnesses, the patentee Montie M. Brohard, Jr., and six merchants, who were the only witnesses before the Court.

None of these witnesses testified, or could have testified, as to the novelty or patentably inventive character of the design patent over the prior art. They did testify as to the marketability or "commercial success" of the plaintiffs' patented shirt. They gave their opinions as to the

attractiveness of the design, and Mr. Brohard, for example, pointed out the minute differences between the prior art patents and publications and the design patent as such differences clearly appear from the documentary exhibits themselves.

There was never any dispute that the prior art patents and publications, and the prior garments made and sold by the Angelica Jacket Company, Sears Roebuck & Co., Fox-Knapp Mfg. Co., and Shirtcraft Co., Inc., all of which were before the Court, were genuine and of dates admittedly long prior to the Brohard alleged invention. In fact, it was *stipulated* that copies of patents and publications were admissible "with the same force and effect as duly certified copies thereof, subject to correction if error appear" (R. 214). It was pursuant to that stipulation that each of the patents and publications referred to by the Court of Appeals was offered and received in evidence. There was never any dispute as to what the prior art patents and publications disclosed, as of course there could not be, since the disclosures were pictorial.

The patent in suit being only a pictorial representation of a simple garment required no explanatory testimony, and the prior art patents were placed in evidence by defendant's counsel without calling any witnesses (R. 214).

The simple fact is, therefore, that the question of validity was decided by the District Court upon a mere comparison of the patent with the prior art documentary exhibits. It was not upon the basis of oral testimony involving any disputes of fact which the Court had to resolve. In addition, the District Court decided that the Brohard shirt was attractive, useful, and commercially successful. The Court of Appeals did not disagree with these findings, because of course a design may be attractive, useful, and successful, without being a patentable inventive advance over the prior art.

The Court of Appeals' judgment that the Brohard design patent is invalid was based entirely upon the application of the long established law of patentable inventive design to the facts which appeared from a simple comparison of undisputed and stipulated patents and publications.

The history of the Patent Office actions resulting in the patent in suit, Exhibit G (R. 214), is not reproduced in the printed record presented by petitioners, but it was before the Court of Appeals and considered by it. In its opinion the Court pointed out that the application for the patent in suit was repeatedly and finally rejected as unpatentable over three prior art references which taught

> "that angularly disposed slide fasteners which start in the vicinity of the collar are old and that the unbroken front panel"

was also old (R. 416). The Court went on to say:

> "Following an appeal to the Patent Office Board of Appeals and a remand to the primary examiner, the patent was later granted following a showing of commercial success, but without retraction of previous Patent Office statements as to lack of invention over the prior art." (R. 416.)

It was one of the contentions of defendant that the Patent Office has no statutory authority to issue a patent upon an article that is a "commercial success", unless it is also an *invention,* and that since the record shows that the Brohard design patent was denied by the Patent Office to be an invention, but was patented because of its "commercial success", the grant was beyond the authority of the Patent Office, and the patent was void as a matter of law. It is apparent from the above quotation that the Court of Appeals agreed with this contention.

It is apparent from the above statements that this was not a case in which the Court of Appeals substituted its

opinion for a finding of fact entered by the District Court as the result of hearing and observing the oral testimony of witnesses at the trial. It is, on the contrary, apparent from the true facts that the Court of Appeals found the design patent in suit invalid as a matter of law, because "it fails to meet the requirements" as to a "*patentable* design", and because, as a matter of law, the Patent Office had no right or authority to issue a patent upon a showing of "commercial success" where the Patent Office itself had found that there was a lack of invention over the prior art.

THE REVERSAL BY THE COURT OF APPEALS OF THE DISTRICT COURT'S HOLDING OF VALIDITY WAS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioners seem to believe that this Court's decision in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, prevents the Court of Appeals from reversing in this case, no matter what its opinion was as to validity of the Brohard design patent.

We do not so understand the *Graver* case. The single sentence from the Graver opinion quoted at page 8 of the petition and brief, seems to us to be quite correct, a restatement of a long established rule, and in no way in conflict with the decision now under attack. The sentence quoted in petitioners' brief appears in a portion of the opinion in the *Graver* case, dealing with "conflicting testimony". In that case there had been "concurring opinions" of the District Court and the Court of Appeals. Here the contrary is true. In the *Graver* case the patent involved intricate matters which were demonstrated in scientific demonstrations, and required a trial of three weeks, during which the trial Judge necessarily visited a number of laboratories to observe welding practices, viewed motion pictures of welding practices, and heard many experts and other witnesses whose testimony was conflicting.

Here the question is whether the location of a shirt zipper, as compared with its location by prior designers, was an invention. This case did not involve intricate matters—it did not require "scientific demonstrations"—it did not require a trial of three weeks, but of only two days—the Judge was not required to visit laboratories or observe shirt making practices or view motion pictures—and the District Judge did not have to listen to experts or conflicting witnesses. Almost the entire time spent at the trial involved the giving of testimony relative to the so-called "commercial success" of the Brohard shirt—a fact which, if true, could not make an invalid patent into a valid one.

The true rule of the *Graver* case, according to our understanding, is that the Supreme Court is not a court to correct errors in fact finding, and will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." That it will review even a "concurrent" finding of validity—where the patent grants a monopoly upon a trivial improvement for which patent protection was never intended by the Constitution, is clearly set forth in the recent opinion in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 95 L. ed. 118, decided December 4, 1950. We have found no appellate court unwilling to reverse a finding of validity of a patent simply because the District Court found it to be valid. Yet in substance what petitioners now seek is to have this Court rule that such must be the practice.

This Court, in the *A. & P.* decision, restated the rule expressed by it in the *Graver* case, and even though in the *A. & P.* case both the District Court and the Court of Appeals had found the patent in suit to be valid and to have involved invention, reversed the judgment holding the patent to be invalid, expressly stating that in so doing

they were not reversing as to any finding of fact. What this Court there said in its opinion by Mr. Justice Jackson was:

> "The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required * * *. It is on this ground that the judgment below is reversed."

In that same decision it was stated in the opinion by Mr. Justice Douglas, with whom Mr. Justice Black concurred:

> "The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law."

In this concurring opinion it was further stated that:

> "The court now recognizes what has long been apparent in our cases: that it is the 'standard of invention' that controls. That is present in every case where the validity of a patent is in issue. It is that question which the court must decide. No 'finding of fact' can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case."

When the Court of Appeals in this case stated that the design patent in suit "fails to meet the requirements" of the law, it was stating precisely what this Court said in the *A. & P.* case, and the many others which preceded it.

RULE 52(a) WAS NEVER INTENDED TO PREVENT AN APPELLATE COURT FROM REVIEWING FACTS AS TO WHICH THERE WAS NO DISPUTE AND WHICH APPEAR FROM DOCUMENTARY EVIDENCE.

It has long been established by many decisions, that a Court of Appeals is as well able as the trial court to interpret undisputed documentary exhibits. It has never been considered to be in conflict with Rule 52(a) of the Rules of Civil Procedure for an appellate court to reverse a judg-

ment even though that necessarily reversed a finding of fact where such a finding was based upon documentary evidence rather than conflicting oral evidence of witnesses whose credibility was judged by the District Court.

In referring to Rule 52(a), this Court in its opinion by Mr. Justice Reed in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394, 395, said:

> "* * * That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In that case a number of the findings were based upon inferences drawn from agreements and written documents. The Supreme Court being clearly as able to draw its own inferences from such documentary exhibits as was the lower court, did so, reversing the court below.

In the recent decision by Judge Yankwich in *Pacific Portland Cement Co.* v. *Food M. & C. Corp.*, 178 F. 2d 741 (CA 9) the Court said:

> "We may make our own inferences from undisputed facts or purely documentary evidence, for to use the colorful language of the Court of Appeals for the Third Circuit, the rule (52a) does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.'"

In *Orvis* v. *Higgins,* 180 F. 2d 537 (CA 2), the Court of Appeals in its opinion by Judge Frank, analyzed the decision in the *Gypsum* case and stated, with gradations, the extent to which the appellate court may reverse a judgment based upon a finding of fact. Among these the Court stated that:

> "If he" (the District Judge) "decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding." (Citing numerous authorities.)

A review of the effect of "Findings in the Light of the Recent Amendments" in an article written by Judge Yankwich, appears in 8 FRD 271. As he points out therein, Courts of Appeal and this Court have frequently taken their own view as to the presence or absence of invention in a patent when it has been a simple matter of comparison of the patent with the prior art.

In this case the Court of Appeals was faced with no conflicting testimony as to the nature of the patent in suit or as to the nature of the prior art. That being so it could, of course, make its own comparison and draw its own conclusions as to validity. In doing so, it did not disturb any finding of fact. It held merely that the patent in suit did not come up to the standards of invention required for a patentable design. There was no dispute as to the file history of the patent in suit and the Court was as well able to draw inferences from it as was the District Judge. The Court of Appeals drew the inference that the patent in suit had been granted only upon a so-called showing of "commercial success", and was therefore invalid.

CONCLUSION.

There is no ground for the grant of a writ of certiorari in this case. There is no conflict of decision between Courts of Appeal which should be resolved by this Court. The Court of Appeals in this case did not decide any federal question contrary to the established rules in patent cases, or contrary to the decisions of this Court. There is no great public question to be resolved as this is a simple patent suit between private parties, which in fact involves an insignificant sum and a palpably invalid patent.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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